

AWARD NO. 306
Case No. 306

File No. Johnston-DK-05-20-INV/MW-BHAM-20-22-LM-481 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline [forty-five (45) day actual suspension] of Mr. D. Johnston, issued by letter dated June 26, 2020, in connection with his alleged improper performance of duty and failure to promptly report an incident to the proper authority, in connection with obtaining track authority on May 13, 2020 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Johnston-DK-05-20-INV/MW-BHAM-20-22-LM-481 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Johnston shall have his suspension set aside with all notations thereof removed from all Carrier records and he shall also be restored all seniority and 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 suspension from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully suspended); (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 suspended from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been suspended 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 removed from service."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On May 13, 2020, Claimant D. K. Johnston was working as a foreman on the Alabama Division, flagging for a utility which was performing work between Hightower and Trammels. When Claimant was obtaining Track Authority (TA) 9600 from the dispatcher, although he repeated the number back correctly, he transposed the numbers and recorded the TA as 9060. He also transposed the numbers of the lead engine in Box 8 of the TA, recording 8143 rather than 1843. When he attempted to clear the TA at the end of the day, he requested to clear TA 9060 before eventually clearing it with the correct number. He also failed to write the clear time on the TA, and he did not report the matter to his supervisor until approximately noon of the next day.

By notice dated May 22, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with improper performance of duty as follows:

1. While obtaining a Track Authority during the incident describe above, he improperly recorded a wrong TA number on the prescribed form.
2. While summarizing the same TA back to the dispatcher, he repeated back the wrong locomotive number in Box 8.
3. While trying to release the same TA, he attempted to clear the wrong TA with the dispatcher.
4. After acknowledging to the dispatcher that the correct TA number was clear, he failed to record the clear time on the prescribed form.
5. He failed to promptly report the above-referenced incidents to proper authority in that he did not do so until the following day.

The hearing was held June 12, 2020, at which audio tapes of Claimant's discussions with the dispatchers were introduced, as was the TA which Claimant completed. Claimant admitted the facts were correctly presented as described above. Following the hearing, Claimant was found to be guilty as charged, and by notice dated June 26, 2020, he was assessed a 45-day actual suspension.

The Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence to establish that Claimant was substantially at fault for the incident, but rather that the dispatcher on duty never took exception to the numbers Claimant read back over the radio. It posits that Claimant made a mistake when writing down the numbers he had repeated, but that such action does not establish a violation of Carrier rules. The Organization asserts that Claimant did not create a safety issue by writing down the wrong numbers, and it states that the charging officer did not enter any rule to support his testimony that Claimant was in violation of written procedure or that he created an unsafe situation. It also denies that there is any evidence that Claimant did not report the matter in a timely manner or that there is any evidence of a rule or policy addressing reporting procedures.

The Organization also argues that the Carrier provided insufficient training to Claimant on how to properly obtain a mobile track authority. It points to Claimant's testimony that he had never had any training and that he was unable to access the system. The Organization states that Claimant's actions were directly connected to the communication between himself and the dispatcher, and that if the Carrier had properly trained Claimant on how to obtain mobile track authority, it is likely the event would not have occurred.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It states that the incident in question was minor, and that the dispatcher shared responsibility. The Organization points out that Claimant has 10 years of service with no prior discipline and it contends that the suspension imposed was harsh and excessive for a first offense of this nature. The Organization concludes that the suspension was not warranted, and that the claim should be

sustained.

The Carrier, on the other hand, maintains that the record contains substantial evidence to support the discipline assessed. It states that there is no question that Claimant was guilty of the charges levied. It asserts that the evidence, including Claimant's own admissions, establish that he was not attentive to his responsibilities as a roadway worker in charge, that he did not exercise caution when observing the controlling TA, nor did he promptly report his violations to the proper authority. The Carrier states that all parties at the investigation understood the safety-sensitive nature of Claimant's assignment as a RWIC providing protection for workers fouling the track, as well as the potential ramifications of his improper performance of duty with respect to his responsibilities as a RWIC. It points to Claimant's concluding statement as acknowledging as much.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to a failure to ensure that the members of his workgroup were properly protected. It states that significant discipline is warranted, citing prior cases in which dismissal was upheld when employees failed to safely perform their duties. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that the suspension assessed is appropriate in light of the significance of the infraction.


We have carefully reviewed the record in this case and the parties' arguments, and we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty as charged. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

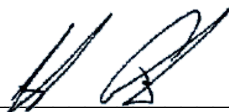
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant failed to properly perform his dues as a RWIC. The facts are not really in dispute, and Claimant candidly admitted to them. While no specific rule was


introduced regarding completion of TAs, the importance of accurate handling of such important safety processes is self-evident. Whether Claimant was adequately trained on mobile track authority applications does not change the fact that he did not properly handle the TA here using one of the common means of communication with the dispatchers.

The next question before us concerns the level of discipline assessed. The Carrier's concern regarding accurate handling of TAs is obviously well founded. We do believe, however, that the record contains mitigating factors which warrant a lesser degree of discipline than was imposed here, not least of which is Claimant's ten years of service with no prior discipline events of record. For Claimant's first offense, we believe a suspension of 15 days would be appropriate to remind Claimant of the seriousness of absolute attention to his duties as a RWIC, and that Claimant should be paid for time lost in excess of 15 days.

AWARD: Claim sustained in accordance with the findings. The Carrier is directed to comply with the Award on or before thirty (30) days following the Award date below.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023