

AWARD NO. 311
Case No. 311

File No. Johnston-DK-10-20-INV/MW-ATLA-20-46-LM-881 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 (dismissal) of Mr. D. Johnston, issued by letter dated December 23, 2020, in connection with his alleged conduct unbecoming an employe in that on September 30, 2020 he allegedly made false and conflicting statements to supervision regarding an alleged injury to his back and shoulder and/or right arm that he reportedly received on the same date while driving spikes in the yard in Savannah, Georgia was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Johnston-DK-10-20-INV/MW-ATLA-20-46-LM-881 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant D. Johnston shall be reinstated to service with all seniority rights restored and all entitlements to and credit for, benefits restored, including vacation and health insurance benefits and being made whole for all financial losses, including compensation for: (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 removed from service); (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 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 September 30, 2020, Claimant D. K. Johnston was working as a foreman in the Savannah, Georgia yard. That day, he reported that he had injured his back, shoulder and right arm while driving spikes in the yard. A written statement indicated that the injury occurred when the handle of his spike hammer had caught in his safety vest, and that Claimant then felt and heard a popping sound on the right side of his neck down to his shoulder. When Claimant's supervisor viewed yard camera footage which showed Claimant spiking, he did not see any instance of Claimant's hammer being caught in his vest.

By notice dated October 9, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with conduct unbecoming an employee in that he made false and conflicting statements to supervision regarding an alleged injury to his back and shoulder and/or his right arm that he reportedly received while driving spikes in the Savannah yard.

After multiple postponements, the hearing was held *in absentia* on December 4, 2020, at which video of Claimant driving spikes was introduced. Following the hearing, Claimant was found to be guilty as charged, and by notice dated December 23, 2020, he was dismissed from service.

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 in cases involving "moral turpitude," such as the accusation here that Claimant made false and misleading statements, the Carrier has an elevated burden of proof. It cites prior awards as holding that more than substantial evidence must be presented to sustain such a charge, and it asserts that the evidence must be at least clear and convincing.

The Organization states that there is no dispute that Claimant was injured at work. It also states that there is no dispute that the hearing was postponed multiple times due to Claimant's medical condition, and that he was unable to attend the hearing due to medication he was taking. The Organization asserts that the Carrier has relied solely on the charging officer's testimony and his opinion regarding the video that Claimant made a false or misleading statement about how the injury occurred. It maintains that, although the video evidence apparently showed Claimant spiking up several ties, the video was not conclusive enough to show what exactly happened. The Organization states that there is nothing which would prohibit Claimant from spiking by hand, and it posits that Claimant was convinced the handle of the hammer got caught in his vest while doing so, which is why he reported the incident the way he did.

The Organization emphasizes that Claimant was not charged with getting injured on the job. It states that the Carrier must prove that Claimant knowingly and intentionally made a false and misleading statement, but that it is impossible to know what occurred, as the video did not show the exact moment of Claimant's injury. It also argues that the Carrier officers, who opined solely from the video that Claimant was not injured as he reported, are not medically qualified to do so. The Organization concludes that the discipline assessment was not warranted, and it urges 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, particularly the video evidence, establishes that the injury could not have occurred as Claimant reported. The Carrier states that the video evidence showed Claimant using the hammer in a fluid motion throughout, and that there was no video evidence that the hammer got caught in the vest at any time while he was performing the work in question.

The Carrier states that the truthfulness of Claimant's statements was further called into question considering the unusual circumstances surrounding the incident. It notes the charging manager's testimony that it was not necessary for Claimant to spike by hand, as there were machines available which could have performed the work more efficiently and safely. The Carrier cites the charging

manager's testimony that the only handwork the gang had performed in the previous two days was setting spikes, as well as his testimony that no one knew why Claimant went to the area in question and started to spike on his own.

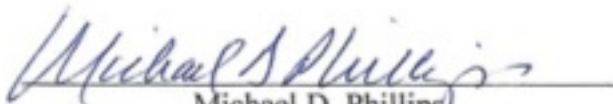
With respect to the level of discipline imposed, the Carrier states that honesty is an integral part of the employment contract, and that dishonesty in any form breaks the bonds of trust necessary in the employment relationship. It states that significant discipline is warranted for dishonest behavior, citing prior cases in which dismissal was upheld when employees were dishonest with respect to reporting personal injuries. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the significance of the infraction and in light of Claimant's prior discipline record.


We have carefully reviewed the record in this case and the parties' arguments, and we find that the record is insufficient to establish that Claimant was guilty as charged. We note that the main piece of evidence relied on by the Carrier is the video evidence of Claimant spiking, but we have not been privileged to view that evidence. There was considerable discussion and narration of the video on the record during the hearing, but those descriptions in our view do not constitute the requisite proof, whether we employ the standard of substantial evidence or some heightened standard, that Claimant intended to deceive the Carrier when he reported his injury, an element that is essential in a dishonesty case.


As noted above, there seems to be little question that Claimant was injured in some way. The charging manager confirmed that, when Claimant finished spiking and approached a contractor, he was favoring his shoulder and complaining of pain, and that he then reported the matter to the manager. The manager also testified that Claimant appeared to be hammering with a smooth motion earlier in the video. This appears to be at odds with what seems to be the Carrier's implication, in its questioning of why Claimant chose to manually spike, that Claimant may have been injured prior to beginning spiking. We do not believe the alleged discrepancy regarding whether Claimant's hammer was caught in his vest is itself sufficient evidence to establish that Claimant had the requisite intent to deceive the Carrier or that he was not injured while spiking.

The record reflects that, at the time of the discipline assessment, Claimant was not medically qualified to perform his duties. He therefore is not entitled to wage loss for any period in which he was not able to perform his duties. Claimant is to be returned to service with seniority intact and with compensation for the period he is out of service subsequent to the point it is established that he was medically qualified, if that has ever occurred. The Carrier is entitled per agreement to offset any outside earnings associated with that time period.

AWARD: Claim sustained in accordance with the findings. The Carrier is directed to comply with this 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