

AWARD NO. 315
Case No. 315

File No. Brown-M-D-02-21-INV/MW-FTW-21-24-LM-059 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. M. Brown, issued by letter dated March 12, 2021, in connection with his alleged failure to protect his assignment on January 19, 2021, when he was allegedly absent from his assignment without authorization from proper authority and for alleged failure to follow instructions in that, despite being provided instructions from supervision regarding his work task(s) to be completed while assigned as a laborer on Gang TM-33 working at Pomona Yard in Greensboro, North Carolina on January 20, 2021, was arbitrary, capricious, unjust, unwarranted, unreasonable and harsh and excessive (System File Brown-M-D-02-21-INV/MW-FTW-21-24-LM-059 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Brown shall now 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 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 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.

During the time frame pertinent to this case, Claimant Miko D. Brown was employed as a track laborer on Gang TM-33, in Greensboro, North Carolina. Claimant was off work on January 18, 2021 for Martin Luther King Junior Day, and he contacted his supervisor that afternoon to request to be off on Tuesday, January 19, 2021 as well. The supervisor did not approve that request, but Claimant did not appear for work on January 19. When Claimant reported to work on January 20, 2021, he was assigned to work with another employee and a backhoe operator to pick up tie scraps behind the TS-34 gang. At the end of the workday, however, the supervisor surveyed the area in which Claimant had been assigned to work, and he observed a significant amount of debris, indicating that nothing had been picked up.

By notice dated January 25, 2021, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to protect his assignment on January 19, 2021 and failure to follow instructions from supervision regarding his work task to be completed on January 20, 2021. The hearing was held February 23, 2021, after which Claimant was found to be guilty as charged, and by notice dated March 12, 2021, 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 the Carrier did not provide sufficient evidence to establish that Claimant was culpable for the alleged violation, and that the Carrier did not establish that Claimant was directly responsible for failing to report to his assignment on January 19, 2021. While it does not deny that he was absent on that

date, it states that Claimant was under the impression based on the phone call and subsequent texts with his supervisor that his request for a personal leave day had been approved. The Organization cites Claimant's testimony that the supervisor never expressly denied his request for a personal leave day, and Claimant's belief based on their final text exchange that the request was approved.

With respect to the second charge, the Organization submits that the Carrier did not establish that Claimant intentionally failed to perform the assigned task of picking up tie butts on January 20, 2021. It states that it is not uncommon for assignments to change throughout a workday, and that this occurred on the date in question. It states that, after Claimant and his co-worker received the initial assignment, a foreman asked for their assistance in setting up derails and navigating the Brandt Truck throughout the yard. The Organization cites the foreman's testimony that Claimant had been helpful, and it posits that the record does not establish that Claimant disregarded instructions. It asserts that this is not a matter of insubordination, but rather one of miscommunication.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 11 years of service and it contends that, even if the charges had been proven, which it denies, dismissal was harsh and excessive, rather than progressive, for an offense of this nature. The Organization concludes that dismissal was not warranted, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It asserts that the record contains substantial evidence to support the discipline assessed, stating 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 did not report for duty on January 19, 2021, even though the supervisor told him he could not give Claimant permission to be off. Likewise, the Carrier states that the record establishes that Claimant failed to comply with the instructions of his supervisor regarding the task of picking up tie butts. The Carrier states that Organization's contention that the issues arose because of communication issues was debunked by the testimony of the supervisor, and it asserts that it was established that Claimant's

actions were deliberate, noting the supervisor's testimony that Claimant reacted dismissively when he was initially assigned the task of picking up tie butts.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to insubordination, and it states that significant discipline is warranted, citing prior cases in which dismissal was upheld when similar conduct was proven. It also notes that Claimant's record includes several other discipline assessments, including a suspension for sleeping on duty. 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 Claimant's record.


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 Claimant's guilt. 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.

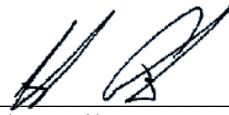
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant was guilty of the charges. The supervisor was unwavering in his testimony regarding the instructions he gave Claimant regarding both picking up ties and the request for leave, and we do not believe the Carrier was required to accept the contention that Claimant's actions were merely the result of a misunderstanding.


With respect to the level of discipline, however, we concur with the Organization that the conduct at issue did not warrant permanent dismissal, especially in light of the foreman's testimony regarding Claimant's assistance and work ethic. On these specific facts, we find that a 90-day suspension would have been sufficient to address the matter. Claimant is to be returned to service with seniority intact and with compensation for the period he is out of service in excess of 90 days. 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