

AWARD NO. 318  
Case No. 318

File No. Frederick-J-05-20-INV/MW-CHAR-20-04-ME-496 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. J. Frederick, issued by letter dated July 9, 2020, in connection with the following:
  - '1. Failure to follow instructions and insubordination in that you were instructed by your supervisor on May 19, 2020, that you were not to order parts or supplies on your own and must request what you need to your supervisor. However, you refused to do so when on May 21, 2020 you ordered supplies without the permission or knowledge of your supervisor.
  2. Conduct unbecoming an employee in that on May 22, 2020, it was discovered that you used an NS company credit card that was assigned to another employee to purchase supplies without authorization on May 21, 2020.
  3. Failure to follow instructions and insubordination in that you were instructed by your supervisor in a letter dated March 6, 2020 that you are to provide the following payroll information each day to your supervisor:
    - Hours worked including any overtime
    - Mileage from where you resided (home or hotel) the previous night to the shop
    - Mileage to where you were going that evening (home or hotel)
    - If you used your personal or company vehicle that morning and again in the evening

You failed to provide the requested information as required, when on May 27, 2020 you sent by text message the required information for the following days: May 20, 21, 22, and 26,2020.

4. Conduct unbecoming an employee in that on May 27, 2020, Supervision discovered that you used Company owned materials and equipment without authorization in order to complete a personal project while on duty and under pay.' (Employees' Exhibit 'A-1')

was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File FrederickJ-05-20-INV\MW-CHAR-20-04-ME-496 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant J. Frederick 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 Justin Frederick was employed as an equipment repairman in the Carrier's Altoona Shop. By notice dated May 29, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to follow instructions and insubordination when he ordered supplies without permission or knowledge of his supervisor, conduct unbecoming when he used a company credit card that was assigned to another employee to purchase supplies without authorization, failing to follow instructions and insubordination regarding failure to provide payroll information to his supervisor, and conduct unbecoming an employee when he used company materials and equipment without authorization to complete a personal project while on duty and under pay. The hearing was held June 18, 2020, after which Claimant was found to be guilty as charged, and by notice dated July 9, 2020, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that Claimant was denied his right to a fair and impartial hearing when the Carrier failed to issue precise charges, stating that the notice of investigation did not reference the specific rule Claimant was alleged to have violated. The Organization asserts that the lack of a rule citation is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone. It also argues that the Carrier did not follow the proper process for withholding Claimant from service prior to the hearing, and that the hearing was unfair in that hearsay statements were admitted.

With respect to the merits, 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 intended to defraud or steal from the Carrier. The Organization also asserts that Claimant did his best to explain the purchases in question, and it posits that he did not willfully disregard the Carrier's rules or any instructions from his supervisor. It avers that the Carrier failed to meet its burden of producing evidence to support the dismissal decision.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 13 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 states that Claimant received a fair and impartial hearing, and it argues that there is no agreement requirement to cite a specific rule in a notice of investigation. The Carrier states that the purpose of a notice of investigation is to make the employee aware of the matter to be investigated so that a defense may be prepared, and it avers that the notice of investigation in this case did just that. It denies that any of the hearing officer's evidentiary rulings were erroneous or that Claimant was prejudiced by any of the procedures employed.

With respect to the merits, the Carrier maintains 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 establishes that he failed to comply with the instructions of his supervisor regarding ordering supplies and submitting payroll information, and that he worked on a personal project using Carrier equipment. The Carrier states that Claimant'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.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to dishonesty and 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 prior dismissal 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 no procedural barrier to our consideration of the merits. We find that the notice of investigation adequately apprised Claimant and his representative of the matter to be investigated. We also find no indication that the procedures employed prevented Claimant from receiving a fair and impartial hearing.

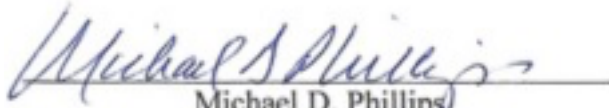
With respect to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the cited rules. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

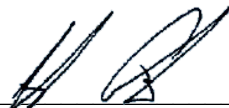
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant was guilty of the charges. The supervisor was unwavering in her testimony regarding the instructions she gave Claimant regarding purchasing supplies and Claimant's not following those instructions. Claimant's contradictory testimony raised a credibility issue in our view, and it has been held in numerous prior awards that such credibility issues are left for the hearing officer to make, not this appellate board. We will not overturn the credibility determination made here. The evidence that Claimant did not comply with instructions regarding daily submission of payroll information was also adequately established, as was the charge that he used Carrier equipment for his own personal purposes. The item he cut out using a company plasma cutter clearly was not for company benefit.


Having found substantial evidence to support the finding of guilt, the next question before us concerns the level of discipline assessed. While the charges in question are indeed significant, we do believe that the record contains mitigating factors which warrant a lesser degree of discipline than was imposed here, including Claimant's 13 years of service with no prior discipline events of record involving similar conduct, as the majority of Claimant's prior discipline involves attendance. On the specific facts of this case, we believe that Claimant should be afforded one last chance to continue his career and to demonstrate that he can be a safe and productive employee.

Claimant should be aware that he cannot expect a similar outcome if any further such incidents occur. Claimant is therefore to be returned to service, with seniority intact, but without pay for time out of service.

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